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Transposition of provisions of the Recast Directive on the functioning of the European Works Council

Jan Cremers and Pascale Lorber

1. Introduction

The need to improve the functioning of European information and consultation procedures has increased as a consequence of the strengthening of the Internal Market with its economic freedoms, globalisation and the impact of increased cross-border and transnational economic activities. The protection of workers' rights requires a more effective transnational voice through information and consultation to counterbalance economic and managerial power and to match global(ised) corporate strategies and decision-making structures. In the preparations for the revision of the Directive, the possibilities for ameliorating the functioning of EWCs have been collected and listed on the basis of experiences of the past 15 years (Jagodzinski 2008; Jagodzinski 2009a). The conditions for improving the functioning of EWCs have been analysed in the recent past at company, national and European level in numerous publications.¹ The European Commission, the European Parliament,² the European trade union federations and the European Trade Union Confederation (ETUC), as well as – last but not least – EWC members themselves have formulated numerous suggestions, proposals and demands³ based on research results and practical experience that address the issue of improving EWC functioning.⁴ The

1 A good overview with policy-relevant conclusions is the 'ETUI Memorandum on EWCs', a research-based contribution for policy-makers on the eve of the Recast Directive (Jagodzinski, Kluge and Waddington 2009).

2 European Parliament report of 16 July 2001, rapporteur: Mr Menrad (A5-0282/2001 final).

3 Some EWCs even wrote letters to the European Commission to inform law-makers about practical problems and needs for the reform of the directive (for example, the EWCs at Heineken, E.ON, Veolia, Delphi, Novartis and others) source: ETUI database of EWCs http://www.ewcdb.eu/search_results_any_documents.php).

4 See, for example, the European Parliament resolution on the Commission report on the application of the Directive on the establishment of a European works council or a procedure in Community-scale (*cont. next page*)

aforementioned research⁵ has demonstrated that proper functioning of EWCs requires that the relevant procedures be based on:

- the principle of information and consultation at a time and with a content that allow EWC members to make an in-depth assessment so that they can formulate an opinion on the envisaged measures;
- the general broadening of assistance and resources, including more regular and frequent meetings and the right to extraordinary meetings and follow-up, as well as improvements with regard to the operations of select committees within EWCs, access to experts (and expert analyses), training and access to modern means of communication (including translation and interpreting services)

The aim of this chapter is to list selected broader legal provisions and key conditions that can contribute to an improved environment for EWC work and thus stimulate improved functioning of this European body (*sine qua non* conditions), although an analysis of several of these broader concepts is not the core aim of this contribution. First, there is evidence that company leadership culture and attitudes condition 'condition the organisation of works councils activity and its effectiveness (van den Bergh, A., Grift and van Witteloostuijn 2008; Jirjahn and Smith 2006). A management that is favourable and committed to dialogue and co-decision, relates the future prospects of the company to workers' well-being and approves of the involvement of works council members is likely to have an effective and thriving EWC (Whittall, Knudsen and Huijgen 2007; Struck 2011; Vitols S. 2003; Wills J. 1999; Nakano S. 1999). By contrast, a management that does not welcome or accept employee participation is more likely simply to follow the letter of the law and not engage fully with the spirit of the legislation. Based on the abovementioned assessment and casework a list of positive incentives or conditions for improved dialogue between management and works council can be formulated. A clear, open-minded and positive vision of the role and position of co-decision and information/consultation procedures inside the company is a crucial condition for success for management and workers. With such pre-conditions met both partners can profit from transparently and mutually expressed expectations. An EWC and thus workers benefit from clear-cut agreements on facilities and provisions to assist with information and consultation, provided they are combined with a real commitment to and investment by management in the process. Consultation flourishes also by mutual respect and trust and, last but not least, partners must respect the arrangements and values expressed in the EWC agreement.

In private contractual arrangements it is primarily the parties involved that shape the relationships. However, the legislator has a crucial role in creating a favourable environment and providing for minimum standards.⁶ Transparent legislation can help with legal certainty, diminishing the potential for conflict and, consequently,

4 (*cont. from previous page*) undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Council Directive 94/45/EC of 22 September 1994), point 2.

5 For instance, in the period 2003–2006 a series of case studies in nine countries were carried out by Eurofound. The reports focused on the relationship of the employee representatives and management involved in an EWC and the influence of external relationships on EWC functioning and identified factors likely to favour or obstruct EWC development: <http://www.eurofound.europa.eu/areas/participationnetwork/ewccasestudies.htm>; see also the EWC Memorandum COM(2008) 419.

6 Those minimum legal standards ensure what is referred to as 'bargaining in the shadow of' (*cont. next page*)

the need for resorting to the courts. It is important to emphasise that resolving disputes about consultation in court will not help to construct effective social dialogue at company level. For the revision of the EWC Directive 94/45/EC the aim of improving conditions for EWC work required the formulation of principles:

- to remedy the lack of legal certainty, to clarify the rules and to eliminate loopholes and inconsistencies;
- to build a more consistent frame for information and consultation procedures;
- to ensure increased compliance and more effectiveness;
- to improve facilities and assistance.⁷

Analysis of the legal conditions for better functioning can be undertaken in both a narrow and a broad sense. Assessing EWC functioning in the narrow sense means looking at (possible) changes related to facilities available to EWCs, such as frequency of meetings or training. A broad assessment of the functioning of the EWC, on the other hand, considers, for instance, the efficacy of the new definitions of information and consultation in conjunction with the (improved) execution of rights and more adequate working methods. These aspects rely directly on other parts of the Directive beyond the technical regulations on available facilities. In this chapter, both approaches are used, first by looking in a very general way at whether the national transpositions provide for an improved ‘climate’ for EWC work; and second, by assessing facilities that have been created or provided to EWCs as a result of national implementation of the Recast Directive. The following parts of the Recast Directive are directly relevant to the functioning of EWCs:

- extended competences;
- facilities that ease the functioning of EWCs;
- enforcement and sanctions.

Although several of these aspects are also referred to in other chapters,⁸ we must also discuss them in the context of this chapter. In Section 2 ‘Extended consequences’ the ‘functional’ parts of the Directive related to improved competences are analysed. Section 3 concerns resources and facilities that directly or indirectly serve the functioning of the EWC. Because of its complexity and importance the question of effective enforcement of ‘functional’ rights is discussed separately in Chapter 4 (see below). In the final section, an attempt is made to draw preliminary conclusions.

2. Extended competences

The aim of the Directive with regard to improving competences is iterated in a number of parts, such as Art. 1 (objectives), Art. 2 (definition of information and

6 (cont. from previous page) the law’ (Bercusson 1996b: 538–552) which, as further research has shown, perform as trend-setters for the negotiated agreements (ETUC and ETUI 2014: 98).

7 As broadly stated in the European Commission Communication opening the second stage of consultations: ‘Consultation of the European social partners on the revision of Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees’.

8 In particular, Chapter 4 (Enforcement Issues).

consultation) and Art. 10 (role of employee representatives). In general, the aim of improving functioning can be derived from Recital 7 of the Recast Directive:

‘It is necessary to modernise Community legislation on transnational information and consultation of employees with a view to ensuring the effectiveness of employees’ transnational information and consultation rights, increasing the proportion of European Works Councils established while enabling the continuous functioning of existing agreements, resolving the problems encountered in the practical application of Directive 94/45/EC and remedying the lack of legal certainty resulting from some of its provisions or the absence of certain provisions, and ensuring that Community legislative instruments on information and consultation of employees are better linked.’

Table 9 suggests that laws transposing the Recast Directive barely mention the aim of the revision concerning EWCs’ competence and functioning; only six countries

Table 9 Implementation of Recital 7 of the Recast Directive 2009/38/EC across the member states

Country	Recital 7 of the Recast Directive implemented
Austria	No
Belgium	Yes. Transposition based on collective agreement that opens with a complete and literal adoption of Recital 7.
Bulgaria	No
Cyprus	No
Czech Republic	No
Denmark	No
Estonia	No
Finland	No
France	No
Germany	No
Greece	The Greek Law of March 2012 is not available in English at the time of writing.
Hungary	Reference is made to Recital 7 where the transposed law says that EWCs shall be established ‘in order to strengthen the right to information and consultation of employees of Community-scale undertakings and Community-scale groups of undertakings’ (Art. 1(1) of Act XXI of 2003 modified by Act CV of 2011).
Iceland (EEA)	No transposing measure available.
Ireland	The purpose of the law is to transpose the Directive on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, which is intended to improve the right to information and consultation of employees in Community-scale undertakings. ⁹

⁹ As stated in the Explanatory Note added to S.I. No. 380 of 2011 European Communities (Transnational information and consultation of employees act 1996) (Amendment) Regulations 2011.

Table 9 Implementation of Recital 7 of the Recast Directive 2009/38/EC across the member states (cont.)

Country	Recital 7 of the Recast Directive implemented
Italy	Parties (the social partners ¹⁰) acknowledge that the sharing of information and consultation which take place within the EWC are a good way of promptly addressing adaptation to new conditions imposed by the globalisation of the economy, because they foster a climate of reciprocal trust and respect between company and employees. Ultimately, the EWC can help in making valuable comparisons between different industrial practices in EU countries, reinforcing the development of a shared approach to the challenges faced by undertakings and employees in the ever faster and more intense process of internationalisation.
Latvia	No, but Section 2 of the transposing measure ¹¹ indicates that the purpose of the Law is to ensure the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings.
Liechtenstein (EEA)	Reference in the preamble to 'the aim to guarantee the effectiveness of transnational information and consultation of workers'.
Lithuania	The purpose of the Law is to ensure the right to be heard, as well as the right to information and consultation of employees in a European Union-scale undertaking or a European Union-scale group of undertakings. ¹²
Luxembourg	No ¹³
Malta	The purpose of these regulations is to improve the right to information and consultation of employees in Community-scale undertakings (...) where requested in the manner laid down in regulation 5 and to implement the provisions of EU Directive 2009/38/EC. ¹⁴
Netherlands	No. The explanatory memorandum of the national transposition underlines the important communication function of the EWC for the company management. Workers' involvement is necessary in decision-making processes as it can increase commitment. Consultation contributes to 'social cohesion'.
Norway (EEA)	The objective is to improve the right to information and to consultation of employees in undertakings and groups operating within the EEA and by so doing to continue in these undertakings the good cooperation which has been developed in a range of agreements and in practice in Norwegian working life.
Poland	No
Portugal	No
Romania	No

10 In Italy the Recast Directive was transposed by means of/on the basis of a Joint Declaration [of the social partners] in favour of implementation of Directive 2009/38/EC of 6 May 2009.

11 Law on informing and consulting employees of Community-scale undertakings and Community-scale groups of undertakings of 19.05.2011 ("LV", 82 (4480), 27.05.2011.) [entered into force on 06.06.2011].

12 Law amending the law of the republic of Lithuania on European works councils, 22 June 2011, No XI-1507.

13 Based on draft legislation *Projet de loi portant modification du Titre III du Livre IV du Code du Travail* of 29/11/2011.

14 Art. 1.2 of the Employment and Industrial Relations Act (CAP. 452), L.N. 217 of 2011.

Table 9 Implementation of Recital 7 of the Recast Directive 2009/38/EC across the member states (cont.)

Country	Recital 7 of the Recast Directive implemented
Slovak Republic	No
Slovenia	The purpose of the Act is to improve the right of employees to information and consultation in undertakings and groups of undertakings established in the member states. Art. 1. ¹⁵
Spain	The central thread of this review is the enhancement and consolidation of the objectives of employee information and consultation in Community-scale undertakings and groups of undertakings so as to make those processes real and effective, with a view to creating scenarios in which fruitful and mutually rewarding channels for dialogue are established between undertakings and employees.
Sweden	The procedure for informing and consulting employees shall be fit for purpose (Section 1 ¹⁶). The Community-scale undertaking or the controlling undertaking in a Community-scale group of undertakings shall actively take steps for the establishment of a EWC or the introduction of another employee information and consultation procedure (Section 17).
United Kingdom	No

Source: Authors' compilation, 2014.

(Belgium, Hungary, Lithuania, Slovenia, Sweden and Spain) make explicit reference to Recital 7 of the Recast Directive. In some other countries (Norway, Liechtenstein) there is a general reference to improved functioning. The aspiration or spirit of the Recast Directive may thus not be fully ensured or realised across the EU.

For the European legislator it seems clear that better functioning is directly related to *allocated competences and applicable scope*. Recital 11 of the Recast Directive stipulates that 'Procedures for informing and consulting employees as embodied in legislation or practice in the member states are often not geared to the transnational structure of the entity which takes the decisions affecting those employees.' Recital 12 further clarifies this by stating that 'Appropriate provisions must be adopted to ensure that the employees of Community-scale undertakings or Community-scale groups of undertakings are properly informed and consulted.' Recital 14 adds to this notion that '[t]he arrangements for informing and consulting employees need to be defined and implemented in such a way as to ensure their effectiveness (...)', while Recital 15 makes clear that information and consultation should take place at the relevant level of management and representation. Finally, Recital 16 further defines the notion of transnationality in terms of potential effects and scope of action.

In the Recast Directive the overall goal is formulated in Art. 1, which says that the arrangements for informing and consulting employees shall be defined and imple-

¹⁵ European Works Councils Act (ZESD-1).

¹⁶ Act (2011:427) on European Works Councils.

mented in such a way as to ensure their effectiveness (1.2) and that information and consultation of employees must occur at the relevant level of management and representation (1.3). The national transpositions of Articles 1(2) and the application of the definition of transnationality are discussed in Chapters 1 and 2.

Directly related to the clarification of competences is of course *improving the existing definitions of information and consultation*. This is formulated in Recital 14 where the need for informing and consulting in a timely fashion is introduced, and made operational in Art. 2 of the Directive. Art. 2.f articulates that information shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking. In some countries, this has led to the adoption of provisions offering practical guidance with regard to the annual report and the documentation to be provided by management to EWC and its members (see Table 10). Art. 2.g adds that consultation should lead to a dialogue at such time, in such fashion and with such content as to enable employees' representatives to express an opinion on the basis of the information provided about the proposed measures.

Table 10 Improved definitions of information and consultation in selected countries (sample)¹⁷

Country	Improved definitions
Belgium	Arrangements for informing and consulting employees shall be defined and implemented in such a way as to ensure their effectiveness. Only dialogue at the level where decisions are prepared and effective involvement of employees' representatives make it possible to anticipate and manage change.
Netherlands	Effective functioning requires more than written information; consultation has to take place through dialogue.
Portugal	For its annual meeting with the EWC, the central management must present a detailed and documented annual report on the progress of the business. The annual meeting shall be held one month after this report has been received.
Slovenia	A written agreement that regulates the information and consultation procedure for employees shall stipulate the conditions under which employees' representatives have the right to be consulted on information received and the procedure for considering their proposals or problems together with the central management or any more appropriate level of management.
Spain	The central thread of the review is the enhancement and consolidation of the objectives of employee information and consultation in order to make those processes real and effective, with a view to creating scenarios in which fruitful and mutually rewarding channels for dialogue are established between undertakings and employees.

Source: Authors' compilation, 2014.

¹⁷ A table showing how Art. 2 has been transposed in all member states is found in Chapter 2.

Table 10 provides examples of good practice where the legislator has gone beyond the bare minimum requirements of the Directive to influence management, either by considering the spirit of the Directive (in Belgium for example, the process of information and consultation is particularly effective), or by calling for practical steps towards increasing dialogue and meaningful consultation (by requiring the provision of annual reports in Portugal).

Improved functioning of EWCs is ultimately, of course, related to the *content of the received information and to (possible) limits on its utilisation*. As hinted in the previous paragraph, consultation is enhanced significantly if workers' representatives are provided with full and relevant information, ideally presented in a format that is understandable to the recipients. In the EWC Directives this (was and) is settled in two ways. First, a relatively open Art. 9 (of both the original 94/45/EC and the 2009 Recast Directives) prescribes that central management and the European Works Council shall work in a spirit of cooperation. Second, Art. 8 of both directives allows the management to withdraw information completely or to demand that EWC members not disclose it if it is deemed confidential. The exemption from providing information applies when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertaking. Table 11 provides selected

Table 11 Examples of national provisions on confidential information

Country	Examples
Czech Republic	Besides EWC representatives, members of the competent trade union organisation and representatives dealing with the protection of health and safety in the workplace shall also be obliged to withhold information expressly provided to them in confidence.
Cyprus	Members of EWCs and managements 'shall jointly decide on the issues covered by confidentiality and data information to be disclosed to third parties'.
France	The transposition exempts the management of a Community-scale undertaking or of the controlling undertaking in a business group that launches a takeover of another undertaking from the duty to refer the matter to the EWC or employee representatives as part of an information and consultation procedure prior to the launch of such a bid.
Slovenia	Confidentiality shall not apply to contacts with other EWC members and to contacts with employees' representatives in establishments or undertakings in the EU member states if these persons have to be informed of the content of information and the results of consultations under the agreement. ¹⁸
Sweden	The EWC shall inform representatives of the employees in the Community-scale undertaking or group of undertakings of the content and outcome of the information and consultation procedure, with any restrictions that may arise from the fact that the employee representatives are subject to a duty of confidentiality. Notwithstanding the duty of confidentiality, it is permitted to transmit such information to other employee representatives or experts in the same body.

Source: Authors' compilation, 2014.

18 Similar regulations are available in Croatia, Germany, Ireland, Sweden and Slovenia.

examples of national legislation that have transposed the confidentiality article, thus restricting the information that can be provided to EWC members.

More practical guidance on the content of information and the subject matter of consultation is given in the Subsidiary Requirements (1.a) of the Recast Directive:

‘The information of the European Works Council shall relate in particular to the structure, economic and financial situation, probable development and production and sales of the Community-scale undertaking or group of undertakings. The information and consultation of the European Works Council shall relate in particular to the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.

The consultation shall be conducted in such a way that the employees’ representatives can meet with the central management and obtain a response, and the reasons for that response, to any opinion they might express.’

In several countries (such as Austria, Belgium, Bulgaria¹⁹ and the Netherlands) aspects of Part 1.a related to obtaining a reasoned response from the management to opinions expressed by the EWC on the Subsidiary Requirements are introduced in the core body of the law, that is, they are applicable to all EWCs (and not only to those set up on the basis of Subsidiary Requirements), while in the remaining majority of countries the right to obtain such a reply from management is not provided for by law.

3. Resources and facilities necessary for the functioning of the EWC

The most concrete provisions concerning facilities necessary for the functioning of EWCs are contained in Articles 6 and 10 of Recast Directive 2009/38/EC. Art. 6 regulates the terms for the functioning of the European Works Council: negotiations ‘*in a spirit of cooperation*’ should lead to *an agreement on detailed arrangements* for implementing information and consultation rights. The agreement determines the coverage of the undertaking(s), the composition of the EWC, functions and procedures, meeting facilities and frequency, the circumstances in which the employees’ representatives meet to discuss the information conveyed to them, the possibility to set up a select committee and financial and material resources. Most specific with regard to facilities and resources is Annex 1. However, a substantial part of these practicalities that can be derived from the Subsidiary Requirements are not mandatory in the case of negotiated agreements. Therefore it is necessary to differentiate between mandatory rules for negotiated agreements (as formulated in Art. 6) and the minimum requirements for compulsory agreements (where Annex

¹⁹ Employee representatives are entitled to request meetings with the employer whenever they have to advise the employer of issues or matters raised by employees (Labour Code Art. 7c).

1 applies). We found that this demarcation is not always clear (for example, in the Czech Republic, see Table 12). Concerning the content of agreements most transposed legal acts follow the listing in Art. 6 of the Recast Directive. However, some countries have added provisions, such as arrangements on the chairing of meetings, term of office, involvement of health and safety representatives and follow-up meetings (for example, Latvia, the Netherlands and Poland, to name a few).

Other novelties contained in the Recast Directive with regard to facilities listed in Art. 6 include: the need for balanced representation in the composition of the EWC (Art. 6(2)(b)); the inclusion of a provision on how national and transnational information will be linked (Art. 6(2)(c))²⁰; the composition of select committees (Art. 6(2)(e) and Recital 30)²¹; and the inclusion of an adaptation clause for when the structure of the group changes (Art. 6(2)(g) and Recital 28).²²

3.1 Balanced representation of different categories of employees, select committee and the right to a reasoned response

The need to ensure a balanced representation of different categories of employee (Recital 20) is not just a formal requirement to satisfy ‘political correctness’ (especially with regard to representation of women), but encompasses an obligation to attempt to compose EWCs in such a way as to reflect the complex composition of the workforce (if possible), thus giving employees’ groups an equal voice (whether men or woman, blue-collar or white-collar).²³ With regard to provisions on *select committees*, this possibility was introduced in Recital 30 of the Recast Directive in order to promote improved coordination and greater effectiveness of regular EWC activities, especially in exceptional circumstances. According to Recital 44, the select committee (if elected) must have up to five members and be able to consult regularly. However, this is not a requirement as the Directive refers only to the setting up of a select committee *if necessary*. It is therefore optional for the negotiating parties. In the case of compulsorily established EWCs, the subsidiary requirements prescribe the obligatory establishment of a select committee (Annex para 1.d) in order to coordinate EWC activities.

In the subsidiary requirements, a reasoned response can be required from central management (para 1(a)) and the circumstances in which the select committee can be involved have been extended to decisions and not only exceptional circumstances (para 1(d) and para 3).

Table 12 focusses on transposition of the need for balanced representation and the creation of a select committee when negotiating the EWC via Art. 6. Table 12 also presents the changes introduced to national subsidiary requirements providing for the right to give a reasoned response by the management following the implementation of the Recast Directive.

20 This aspect is dealt with in Chapter 1 by Sylvaine Laulom and Filip Dorsemont.

21 Considered below.

22 This aspect is dealt with in Chapter 2 by Sylvaine Laulom.

23 S. Picard, *European Works Councils: a trade union guide to Directive 2009/38/EC* (report 114, ETUI 2010) p. 86.

Table 12 Transposition (from Art. 6) of the requirement to provide balanced representation in the EWC and to create a select committee, if necessary

Country	Balanced representation in the EWC	Creation of a select committee
Austria	Yes	Yes (optional)
Belgium	Yes	Yes (optional)
Bulgaria	Yes	Yes (called a 'standing committee' and optional)
Cyprus	Yes	Yes (compulsory)
Czech Republic	No	No (a smaller committee is envisaged but it is unclear whether it is under Art. 6 or subsidiary requirements)
Denmark	Yes	Yes (called an 'executive committee' and optional)
Estonia	Yes	Yes (optional)
Finland	Yes	Yes (called an 'executive committee' and compulsory)
France	Yes	Yes (called the 'board' of the EWC and optional)
Germany	Yes	Yes (compulsory and detailed procedure: a committee of its members to conduct ongoing business. The Committee shall comprise the chairperson and at least two, but no more than four, other members to be elected. The other members of the Committee shall be employed in different member states)
Greece	Not available ²⁴	Not available
Hungary	Yes	Yes (managing committee and optional)
Iceland	Transposition not available	Transposition not available
Ireland	Yes	Yes (optional)
Italy	Yes	Yes (optional)
Latvia	Yes	Yes (optional)
Liechtenstein	Yes	Yes (committee of the EWC which is compulsory)
Lithuania	Yes	Yes (committee of the EWC which is compulsory)
Luxembourg	Not available	Not available
Malta	Not available in English	Not available in English
Netherlands	Yes	Yes (optional)
Norway	No	Yes (special committee and optional)
Poland	Yes	Yes (presidium and optional)
Portugal	Yes	Yes (optional)
Romania	Yes	Yes (optional)
Slovakia	Yes	Yes (optional)
Slovenia	Yes	Yes (optional)
Spain	Yes	Yes (optional)
Sweden	Yes	Yes (optional)
United Kingdom	Yes	Yes (optional)

Source: Authors' compilation, 2014.

24 At the time of writing the Greek transposition law was available only in Greek.

Most countries have literally copied the exact wording of the new requirements from the Recast Directive into their national legislation. A request for the establishment of a select committee, as in the Directive, is mainly optional across all member states, but it is often given a different title or wording. Only in Cyprus, Finland, Germany, Liechtenstein and Lithuania did the national legislator request that the SNB and management include provisions installing a select committee in their agreements. The German model is the most elaborate, reflecting the extensive, well-regulated national legal tradition in the matter of workers' rights. The common copying of the select committee requirement is to some extent welcome, as the positive role of select committees has been established when it comes to coordinating activities between EWC meetings.²⁵ However, such legal practice by the national legislator again highlights the problem with verbatim reproduction of the wording of the Directive and raises questions concerning the clarity and effectiveness of such generally phrased provisions.

Table 13 Transposition (from subsidiary requirements) of the requirements to give a reasoned response and to extended information and consultation with regard to decisions that affect the employees to a considerable extent

Country	Reasoned response	Decisions that affect employees' interests to a considerable extent
Austria	Yes, but general definition of consultation, not only subsidiary requirement	No
Belgium	Yes	Yes
Bulgaria	Yes ²⁶	No
Cyprus	Yes	Yes
Czech Republic	No	Yes
Denmark	Yes	Yes
Estonia	Yes, but general definition of consultation, not only subsidiary requirement	Yes
Finland	Yes	Yes
France	Yes	Yes
Germany	Yes, but general definition of consultation, not only subsidiary requirement	Yes
Greece	Not available	Not available
Hungary	Yes	No
Iceland	Not available	Not available
Ireland	Yes	Yes
Italy	Yes	Yes
Latvia	Yes	Yes
Lithuania	Yes but applicable to all consultations	No

²⁵ S. Picard, *European Works Councils: a trade union guide to Directive 2009/38/EC* (report 114, ETUI 2010) p. 90.

²⁶ Employee representatives are entitled to request meetings with the employer whenever they have to advise the employer of issues or matters raised by employees (Labour Code Art. 7c); this right includes the possibility to visit company premises/sites.

Table 13 Transposition (from subsidiary requirements) of the requirements to give a reasoned response and to extended information and consultation with regard to decisions that affect the employees to a considerable extent (cont.)

Country	Reasoned response	Decisions that affect employees' interests to a considerable extent
Luxembourg	Yes ²⁷	At least in case of questions affecting the interests of workers to a considerable extent.
Malta	Yes	No
Netherlands	Yes	Yes
Norway	No	No
Poland	Yes	No
Portugal	No	No
Romania	Yes	Yes
Slovakia	Yes	Yes
Slovenia	Yes	Yes
Spain	Yes	Yes
Sweden	Yes ('reasoned answer')	No
United Kingdom	Yes	No

Source: Authors' compilation, 2014.

The above discussed changes were introduced to increase the effectiveness of EWCs and of the process of consultation. The role of the select committee in dealing with exceptional circumstances and decisions was also regarded as a significant element in that respect.²⁸ In terms of general observations concerning the transposition of the relevant provisions, on the positive side we note that most national acts have transposed the requirement to provide EWCs with a reasoned answer to opinions expressed by the EWC, with the added advantage that some countries have generally applied this obligation to all consultation processes (including those taking place based on negotiated agreements) and not only to those based on the subsidiary requirements. Regrettably, with regard to provisions concerning exceptional circumstances a number of national jurisdictions seem to have omitted the word 'decisions' from the transposition despite the fact that it was considered that such an addition would ensure better workers' rights by anticipating changes. It is therefore disappointing that the new word was not added.

4. Role and protection of employees' representatives and the right to training

Art. 10 of the 2009/38/EC directive on the 'Role and protection of employees' representatives' is innovative because it emphasises the role that should be attributed to employee representatives to render the EWC more effective. While the original

²⁷ Based on draft legislation *Projet de loi portant modification du Titre III du Livre IV du Code du Travail* of 29/11/2011.

²⁸ Group of Experts Report Implementation of Recast Directive 2009/38/EC on European Works Councils, December 2010, p. 36.

Directive 95/45 already provided employee representatives with protection when exercising their functions, there was a lack of positive engagement to give EWC members the means to fulfil their roles. This has been remedied by a general provision in Art. 10(1) which states that ‘the members of the EWC shall have the means required to apply the rights arising from this Directive, to represent collectively the interests of the employees (...)’. Further, in order to fulfil their functions fully, the SNB or EWC members are entitled to training without loss of pay under Art. 10(4).

The final requirement of training was included to increase the effectiveness of EWCs and the information and consultation rights. The rationale is quite obvious: better trained representatives are able to contribute more constructively to transnational dialogue and are not impaired by communication or knowledge issues. It has been made clear that management should bear the cost of training (European Commission 2010a). The ETUC representing the demands of European trade union federations also argued that training should not only cover language courses, but should extend also to any relevant programme that can help representatives to perform their functions effectively (Picard 2010a).

The inserting of ‘means’ and ‘collective representation’ in the Recast Directive has its origin in the difficulties experienced by EWCs in taking legal action, especially when members of the EWC included management. The different national positions and the lack of provisions in the original Directive had led to legal uncertainty. Art. 10(1) is therefore an effort to clarify the situation, giving the EWC legal standing to take action in case of infringement of the rules.²⁹ The question was subsequently whether means could include financial means and could refer to the possibility for the EWC to take legal action (on behalf of the employees). It should also include the availability of financial resources for the EWC in order to take such legal action. This aspect is developed in Chapter 4.

The subsidiary requirements (Art. 7) of the original EWC Directive 94/45/EC already included rules on means, in particular those of a financial nature, which have been replicated in Art. 6 of the Recast Directive stipulating that the operating expenses of the European Works Council (and of the SNB, Art. 5.6) shall be borne by the central management (according to Art. 7). Moreover, reference is made to resources necessary for the EWC members to perform their duties.

Table 14 looks at the transposition in national law of the requirement to provide EWCs with the necessary resources, including the means to represent workers collectively and training without loss of pay. Another issue is whether there are provisions on costs being borne by management.

The study of national transposition laws in this area shows, first, that all countries have introduced provisions requiring management to pay for the operation of the SNB or the EWC. Furthermore, all countries now allow employee representatives to have training without loss of pay. Nevertheless, problems with the right to training persist in some member states. A case in point may be Hungary, where the right to

29 Group of Experts Report Implementation of Recast Directive 2009/38/EC on European Works Councils, December 2010, p. 37.

Table 14 Means provided to EWC and their members

Country	Means to represent collectively the interests of the employees	Right to training without loss of wages	Costs of operation (EWC and SNB) born by management
Austria	No	Yes	Yes
Belgium	Yes (means are granted to EWC members and employee representatives)	Yes	Yes
Bulgaria	No	Yes ³⁰	Yes ³¹
Cyprus	Yes	–	Yes
Czech Republic	Yes	Yes	Data not available
Denmark	No	Yes	Yes
Estonia	Yes	Yes	Yes
Finland	Yes	Yes	Yes
France	No	Yes	Yes
Germany	No	Yes	Yes
Greece	No	No	No
Hungary	Yes	Yes	Yes
Iceland	Not available	Not available	Not available
Ireland	Yes	Yes	Yes
Italy	Yes	Yes	Yes
Latvia	No	Yes	Yes
Lithuania	No	Yes (?) ³²	Yes
Luxembourg	No	Yes	Yes ³³
Malta	Yes	Yes	Yes
Netherlands	They shall be provided with such facilities as they reasonably require for the performance of their duties	Yes	Yes
Norway	No	Yes	Yes
Poland	No	Yes	Yes

30 Art. 11, para 9 of Decree 55 (Act amending the Act on informing and consulting employees in multinational undertakings, groups of undertakings and European companies) states ‘Where necessary for the exercise of their representative duties in an international environment, the members of the European works council or standing committee shall be provided with training. The cost of the training may not be deducted from their wages’.

31 Art. 8 (2) 5 of the Law on Information and Consultation with Employees of Multinational (Community-Scale) Undertakings, Groups of Undertakings and Companies of 2006 concerning the operation of EWCs ensures full coverage of the operation costs, yet it is unclear whether the same applies to SNBs because Art. 7 Section 4 seems to limit facilities for the latter to training and communication.

32 The Lithuanian transposition law speaks of ‘training opportunities’ rather than ‘training’: Lithuania: ‘Article 13. Protection of the rights and guarantees of employees’ representatives. 1. Members of the European Works Council or of the committee of the European Works Council, as well as members of the special negotiating committee (...) shall be provided with training opportunities where required by their representation duties, while retaining their job and average wage.’

33 Based on the *Projet de loi portant modification du Titre III du Livre IV du Code du Travail* of 29/11/2011.

Table 14 Means provided to EWC and their members (cont.)

Country	Means to represent collectively the interests of the employees	Right to training without loss of wages	Costs of operation (EWC and SNB) born by management
Portugal	Yes (the special negotiating body, the European Works Council, the select committee and the employees' representatives in the context of the information and consultation procedure shall have a right to the material and technical resources needed to perform their duties)	Yes	Yes
Romania	Yes	Yes	Yes
Slovakia	Yes (resources made available for the performance of their role in the collective representation of the interests of employees)	Yes	Yes
Slovenia	Yes	Yes	Yes
Spain	Yes	Yes	Yes
Sweden	No	Yes	Yes
United Kingdom	Yes	Yes	Yes

Source: Authors' compilation, 2014.

training was (admittedly, possibly in the legislator's attempt to provide more clarity) limited to a closed list of topics, by defining that 'training that aims at providing knowledge required for the fulfilment of needs relating to practical requirements of the EWC activity, including communication and foreign language skills, and for the understanding of the legal and labour background, international structure and strategy of the Community-scale undertaking (...)' (Art. 68(2) of the transposition act). It seems to exclude training on, for example, financial aspects of company operations, restructuring, outsourcing and so on, that might be relevant for EWC operations. Another issue occurring in national transposition laws regarding training can be summarised as follows:

- providing 'training opportunities' or 'access to training', which are not the same as being 'provided with training', or, at least, cause unnecessary interpretation problems;
- stipulating that the 'content of training subject to parties' agreement' (Poland), which raises questions concerning EWC's autonomy in determining training contents according to its own needs as opposed to training contents being imposed (or, at least, blocked) by company management. Legal doubts also arise with regard to potential clashes between the EWC and management over the content of training, as the law does not provide for a solution to solve them;
- arguably improper transposition of the entitlement to training in countries in which no paid time-off for training is guaranteed (Bulgaria, Greece).

On the other hand, Art. 10(1) has been transposed in nearly half of the countries. In some cases, the Recast Directive's provisions have simply been copied and pasted (for example, in Cyprus, Estonia and Finland), while in other cases there has been a slight rewording, with Portugal being the more explicit and forceful, inserting a right to material and technical resources to perform duties. It thus appears that countries are formally committed to provide employee representatives with the necessary means to perform their duties, but, as with other rights, remain very general and vague with regard to arrangements, making it potentially difficult for workers' representatives to effectively demand these means and facilities from management. The lack of transposition of Art. 10(1) in some national settings does not indicate an immediate breach of the Directive because (or provided that) national law may already give information and consultation committees (at national and supranational level) the capacity to take actions (see Chapter 4 for more details).

4.1 Duty to report back about information and consultation

The collective right to represent workers and the new facilities available to representatives are interlinked with a collective obligation, namely a duty to report back to national employee representatives or the whole workforce in relation to the content and outcome of the information and consultation procedure (under Art. 10(2) and Recital 33 of the Recast Directive). This duty was moved from the subsidiary requirements to the main text of the Recast Directive because the circulation of information was rightly considered to improve the effectiveness of the EWC and information and consultation rights (European Commission 2010a). This was partly a request from management that dissemination of meeting information should also rest with EWC members. The requirement was also hoped to improve articulation and facilitate a factual exchange of information between national and transnational fora. However, the ETUC argues that fulfilling the new communication duty involves management facilitating the information of the relevant representatives by enabling EWC members to have access to all sites (Picard 2010a). Table 15 indicates whether national laws have transposed this new requirement.

The requirement to inform workers domestically about the outcome of information and consultation has been transposed in all member states for which the national law is available in English, with the exception of the Czech Republic. Most jurisdictions have, as has been notoriously common with regard to other provisions, copied and pasted verbatim the wording of the Recast Directive (Austria, Cyprus, Finland, Hungary, Ireland, Italy, Latvia). Belgium, Germany and Lithuania have given more detail concerning the reporting duty, with Belgium being more in line with the ETUC recommendations as the duty comes along with the obligation to provide the EWC members with the necessary means and time to fulfil this new task. Based on interpretation of the Recast Directive, as has been consistently argued by the trade unions, the requirement to provide the necessary means for reporting back implies the imperative provision of the right to meet with the represented workforce on company premises. Such visits to company premises must be facilitated and any linked costs must be reimbursed by the management (Picard 2010a).

Table 15 Transposition of the EWC members' duty to report back to local representatives

Country	Transposition of Art. 10(2)
Austria	Yes
Belgium	Yes (The necessary time and means shall be granted to the members of the European Works Council and the employees' representatives (...) to enable them to inform)
Bulgaria	Yes
Cyprus	Yes
Czech Republic	No
Denmark	Yes
Estonia	Yes (members of select committees can also discharge this duty)
Finland	Yes
France	Yes
Germany	Yes (specify to local representative committee and possible written report)
Greece	Not available
Hungary	Yes
Iceland	Not available
Ireland	Yes
Italy	Yes
Latvia	Yes
Lithuania	Yes (EWC and select committee to provide information at least once a year)
Luxembourg	Yes
Malta	Yes
Netherlands	Yes
Norway	Yes
Poland	Yes
Portugal	Yes
Romania	Yes
Slovakia	Yes
Slovenia	Yes
Spain	Yes
Sweden	Yes
United Kingdom	Yes (possible sanctions for non-compliance)

Source: Authors' compilation, 2014¹

Last, but not least, our analysis of provisions concerning the workers' representatives' duty to report back revealed that in some member states the introduction of these provisions was accompanied by relevant enforcement rules. In the United Kingdom workers' representatives are not only legally obliged to report back to their constituencies about the work of EWCs, but may also face penal responsibility in case of their failure to do so. In the United Kingdom, workers are entitled to start legal proceedings against their representatives in such cases. The United Kingdom has thus gone beyond the legal minimum set by the Directive, but not in a direction that seems to be encouraged by the European legislator, as there is no trace of such

a zealous interpretation of the Directive in the Expert Group Report (European Commission 2010a) or any similar document. While such a choice of rules transposing the Directive can hardly be argued against and seem perfectly legal, it will, at the same time put workers' representatives under additional pressure. It also has the potential for creating litigious situations in cases where, for instance, workers' representatives will claim they have not been provided the necessary means to report back by the management, while the latter will claim the opposite (compare, for example, the Luxembourg Act of 2011, Art. L-433-8, which explicitly penalises management for such actions). Obviously, even ideal provisions cannot eliminate conflicts entirely in advance, but any legal framework should at least be transparent and clear enough to minimise the risk of lawsuits.

4.2 Advisors and experts

From the national level we know that information and consultation processes can be improved by the use of *advisors and experts*. The original EWC Directive already allowed the presence of experts in negotiations for the establishment of EWCs (in the special negotiating body, Art. 5). Further, EWCs (or select committees), based on the subsidiary requirements, could be assisted by experts, in so far as this is necessary to carry out their tasks (Annex to the Directive, para 5). Member states may formulate limits in this regard (to one expert, Annex paragraph 6). The recast Directive extended these rights, stating that:

‘For the purpose of the negotiations, the special negotiating body may request assistance from experts of its choice which can include representatives of competent recognised Community-level trade union organisations. Such experts and such trade union representatives may be present at negotiation meetings in an advisory capacity at the request of the special negotiating body.’ (Recital 4 of the Preamble)

This expansion and reference to trade unions is now found in Art. 5(4), but has not been mirrored in the subsidiary requirements (Annex to the Directive), which is surprising and inconsistent. The possibility to have recourse to European trade unions (ETUFs) in negotiations is further explained or justified in Recital 27, which acknowledges the role that trade unions can play in negotiating agreements as they provide employees with support. It is important to note that introduction of the reference to European trade unions was a direct response to one of the demands of the ETUC at the time of the debates preceding the revision of the Directive³⁴ and was not controversial for the other social partners.³⁵

This provision could be interpreted as meeting two of the Recast Directive's goals: (i) to boost legal certainty and clarity, as there had been questions in practice about whether European trade unions could be experts and attend negotiations;

34 ETUC demands available at <<http://www.worker-participation.eu/European-Works-Councils/Recast-Directive/Table-ETUC-demands-and-Commission-proposal>>

35 Group of Experts Report, Implementation of Recast Directive 2009/38/EC on European Works Councils December 2010, p. 29.

(ii) to improve the effectiveness of EWCs as European trade unions can disseminate best practice and offer expert support and long-standing experience in EWC practice.

Table 16 shows examples of how experts are used in some countries and whether member states have inserted the new requirement on European trade unions in their SNB processes.

Table 16 Use of experts and transposition of new Art. 5(4)

Country	Examples of use of experts	Access to European trade unions as experts for SNB negotiations
Austria	For the purpose of negotiations with the central management the SNB can be assisted by experts of its choice. EWCs' recourse to experts can be limited to one.	Yes
Belgium	The European Works Council and the select committee may be assisted by experts of their choice, in so far as this is necessary for them to carry out their tasks. A protocol on cooperation lays down the practical arrangements for the presence of experts at the EWC and select committee meetings.	Yes
Bulgaria	The EWC or the select committee may be assisted by experts of their choice, insofar as this is necessary for the performance of their tasks.	Yes
Cyprus		Yes
Czech Republic		Yes
Denmark		Yes
Estonia	The EWC may be assisted by experts of its choice.	Yes
Finland	Yes	Yes
France	Yes	Yes
Germany	The EWC may obtain support from experts of its choice if necessary to enable it to discharge its duties properly. Experts may be authorised trade union representatives. If experts are consulted, the obligation to bear costs shall be restricted to one expert unless otherwise agreed.	Mentions trade union representatives but not European.
Greece		Legislation not available in English.
Hungary		Yes
Iceland		Legislation not available
Ireland		Yes
Italy		Yes
Latvia	The select committee or the EWC shall utilise the assistance of experts selected at its own discretion, where this is necessary in order to perform its duties.	Yes
Lithuania		Yes
Luxembourg		Not available

Table 16 Use of experts and transposition of new Art. 5(4) (cont.)

Country	Examples of use of experts	Access to European trade unions as experts for SNB negotiations
Malta	The European Works Council or the select committee may be assisted by experts of its choice, in so far as this is necessary for it to carry out its tasks.	Yes ³⁶
Netherlands		Yes
Norway	The EWC or working committee may seek the assistance of experts of its own choice if this is considered necessary to carry out its tasks. The management can stipulate that only one such expert may have their fees covered by the undertaking/group.	No
Poland	The EWC or the Presidium may be assisted by experts of its choice, in so far as this is necessary for them to carry out their tasks.	Yes
Portugal	The EWC and the select committee may be assisted by experts of their choice, insofar as this is necessary to carry out their tasks. The costs of at least one expert are borne by the central management.	Yes
Romania		Yes
Slovakia		Yes
Slovenia	The rules of procedure may provide for experts to assist the EWC and its committees.	Yes
Spain	Presence of and advice from experts, who could be from a trade union, is foreseen at elections of representatives.	Yes
Sweden	The EWC and the select committee may be assisted by experts of their choice	No
United Kingdom		Yes

Source: Authors' compilation, 2014.

With the exception of Norway, Sweden and Germany, all countries refer to European or Community-level trade unions or employee representatives in their implementation acts transposing the Recast Directive. There is therefore a very high rate of compliance, although the lack of transposition of this important achievement of the Recast Directive in three member states is worrying and deprives workers' representatives and EWCs of a key resource in terms of knowledge, support and experience, thus potentially putting at risk the achievement of another goal of the Directive, which is to boost the effectiveness of EWCs overall.

5. Conclusions

The Recast Directive is intended to improve the effectiveness of EWCs and to clarify how they should operate. As already discussed, this took the form of refined and

36 'Such experts and such trade union representatives may be present at negotiation meetings in an advisory capacity at the request of the special negotiating body' (Art. 5, para 13).

extended definitions of transnational information and consultation, but also translated into new essential requirements, such as giving EWC members the means to collectively represent workers' interests and to benefit from access to training without loss of pay. Other important additions included the possibility to call in experts representing European trade unions in the course of EWC negotiations and increased recourse to select committees when decisions likely to affect the workforce were envisaged. Some novelties were introduced only as options, such as balanced representation of the workforce or setting up a select committee in negotiated agreements. However, the positive message is that most countries have embraced the changes and integrated them into national law, even if this transposition was in many respects only formal and limited to a copy-paste from the text of the Recast Directive itself. A limited number of member states have either integrated the spirit of the changes by inserting recitals and objectives or have given the new provisions more substance than required by the Directive (for example, Belgium in relation to Recital 7 which states the objectives of the Recast Directive and the more generous facilities given to EWC members when they have to report to local representatives). The large majority of countries, however, seem to have copied and pasted the Directive. Therefore how some of those changes will be inserted in agreements remains a matter of local interpretation and practice. This approach is regrettable and counter-productive as it pushes responsibility for clarification onto the parties negotiating EWC agreements, while one of the supreme overarching objectives of the Recast Directive was to increase legal certainty (Recital 7 of the Preamble).

Flexibility in designing national legal frameworks is, however, obviously needed. The main reasons are the different national traditions, needs and profiles of multinational companies. For example, some countries or larger multinationals may be more accustomed to having a select committee that runs the day-to-day activities of the EWC. The legislative changes and national implementation, by offering options to the parties, thus seem to be going in the right direction with regard to relatively straightforward 'mechanical' changes. Nevertheless, when it comes to measuring impact against aims, numerous countries did not transpose recitals or even the content of Art. 10(1), which expressly states the need for EWCs to have sufficient means to represent workers collectively and apply information and consultation rights. One general conclusion is thus that optional and non-controversial provisions, which are more 'mechanical' and less burdensome (for example, setting up select committees or the right to training), have been transposed into national laws more commonly and extensively. On the other hand, the less specific and perhaps more complex and significant changes which required interpretation and choice – such as Art. 10(1) – have not received the same attention on the part of national authorities, which tended to neglect them, either reproducing the vagueness of the Directive or simply leaving them out altogether.